With respect to the second issue, TCG argues that the arbitration panel's decision would allow Ameritech Michigan, when it provides end-office termination, to retain revenues that cover the cost of services that may be provided with TCG's tandem facilities. This could occur because the RIC, which is assessed on the basis of end-office termination, recovers part of the cost of tandem switching. TCG proposes that the provider with tandem facilities connected to the toll carrier issue a single bill covering applicable access charges of both providers. When TCG provides the tandem switching and Ameritech Michigan the end-office termination, TCG's proposal would have it remit 70% of the RIC and other end-office charges to Ameritech Michigan and retain 30% for itself.

The Commission adopts the arbitration panel's decision to authorize each provider to bill toll carriers for the specific elements of access that it provides, as proposed by Ameritech Michigan. Although TCG's argument raises a question concerning the current structure of the RIC, a comprehensive restructuring of toll access charges, including the RIC, is imminent. Under the circumstances, it would not be practical at this time to adopt a stopgap measure based upon TCG's view that access charges are not shared equitably. The FCC is in a better position to initiate a review of access charges in the first instance, given that access affects both interstate and intrastate toll traffic. In general, tariffs for intrastate access currently "mirror," or incorporate the same charges as those provided in, interstate tariffs. See MCL 484.2310(2); MSA 22.1469(310)(2).

With respect to the third issue, relating to indemnification, TCG argues that each provider should indemnify the other fully for liability to their own customers if the liability can be attributed to facilities, personnel, or problems that are within the indemnifying provider's control. TCG claims that if its customers incur damages from substandard service caused by Ameritech Michigan's network, the Commission's complaint process would not provide an effective, timely remedy,

particularly if TCG loses the customer. TCG argues that Ameritech Michigan's offer of limited indemnification reflects an anticompetitive, monopolistic mindset that seeks to restrict all customers to the same type of service. TCG says that, in the short run, no competitive provider will be able to offer service without interconnections to Ameritech Michigan's much larger network.

TCG states that the parties have continued to negotiate and that Ameritech Michigan has made some concessions on the indemnification issue in a proceeding in Wisconsin. Although TCG objects to that proposal as well, it says that it is an improvement on the indemnification provision adopted by the arbitration panel.

The Commission is not persuaded that either party's final offer would be an acceptable term or condition of an interconnection agreement. Both offers may create perverse incentives. As observed by the arbitration panel, TCG's offer could create an incentive for providers to overbuild their networks as a means of providing backup against service outages, even if the duplicative facilities would not be economically efficient. It may also induce TCG to compete for customers by offering them better guarantees of performance than could be economically justified if TCG were required to build and maintain all of the facilities that are necessary to provide service. On the other hand, Ameritech Michigan's offer on the indemnity issue precludes customers from seeking to improve the quality of the service offered to them by competing providers. It could also create a disincentive for an incumbent to provide services to an interconnecting provider that are comparable to the services it provides to its own end-use customers. Both positions could lead to discriminatory concessions in favor of selected customers or against disfavored providers. Neither is compatible with a competitive market or the purposes of the Michigan Telecommunications Act. See MCL 484.2101(2); MSA 22.1469(101)(2). The Commission will not rewrite either party's indemnification offer and therefore concludes that both must be rejected.

Because the Commission does not wish to delay the process of interconnection, it approves the agreement as submitted by the arbitration panel, without an indemnification provision. The remainder of the agreement shall become effective immediately. However, the Commission is concerned that some indemnification provision may be needed to make the interconnection agreement work efficiently. Therefore, it directs the parties to resume negotiations on the indemnification issue and to resubmit proposals within 30 days. If the parties are able to agree on an indemnification clause, they should submit it jointly. Otherwise, they should each submit their best offer, keeping in mind that their offers must be more reasonable than their offers to date and must be compatible with the purposes and policies of the Michigan Telecommunications Act.

Although the parties raised no other objections, certain provisions of their interconnection agreement are similar to provisions reviewed by the Commission in the August 22, 1996 order in Case No. U-11098. For example, Section 7.3.4 of the TCG/Ameritech Michigan agreement sets a 180-day deadline for TCG to complete interconnection arrangements with other local exchange carriers that deliver local traffic to TCG. It further provides that either TCG or Ameritech Michigan may (but not shall) block transit traffic originated by the third-party provider if the 180-day deadline is not met. In Case No. U-11098, supra, pp. 14-15, the Commission did not reject a comparable provision, but it added that it "expects that this provision will not be used to unreasonably disrupt service or to delay or impair interconnection with providers that are not parties to this contract."

As another example, the footnote to the pre-1997 pricing schedule in the TCG/Ameritech Michigan agreement recognizes that the rate provisions in the schedule are subordinate to Commis-

sion decisions setting different rates.[7] In construing the same footnote in Case No. U-11098, the Commission determined that it had the effect of incorporating rates approved in Case No. U-10647 when inconsistent rates appeared in the schedule itself.

The Commission's discussion in the order in Case No. U-11098 should be deemed equally applicable to comparable provisions in the TCG/Ameritech Michigan agreement.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17101 et seq.

b. The parties' final offers on the issue of indemnification should be rejected.

c. Except for the indemnification provision, the interconnection agreement, as adopted by the arbitration panel, should be approved.

THEREFORE, IT IS ORDERED that:

A. The final offers of both parties on the issue of indemnification are rejected.

B. Except for the indemnification provision, the interconnection agreement, as adopted by the arbitration panel, is approved.

C. A complete copy of the interconnection agreement, as adopted by the arbitration panel and approved by the Commission, shall be filed within ten days of the date of this order.

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[7]The text of the footnote is quoted in footnote 6 of this order.

D. The parties should submit proposals on the indemnification issue within 30 days.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

I dissent, as discussed in my separate opinion.

/s/ John C. Shea
Commissioner

/s/ David A. Svanda
Commissioner

By its action of November 1, 1996.

/s/ Dorothy Wideman
Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the petition of TCG DETROIT for arbitration to establish an interconnection agreement with AMERITECH MICHIGAN.	)))))	Case No. U-11138

DISSENTING OPINION OF COMMISSIONER JOHN C. SHEA

(Submitted on November 1, 1996 concerning order issued on same date.)

I cannot join in the order signed by the majority today because, by its order, the majority cedes significant sovereign authority of the state of Michigan to the federal government. This result is neither necessary nor lawful.

As I have previously stated, see, Case No. U-11125, June 26, 1996, separate opinion, I believe that the Michigan Public Service Commission (the"Commission") may exercise only the authority vested in it by the Michigan Legislature, specifically in this matter, the provisions of the Michigan Telecommunications Act, 1991 PA 179 as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq. (the "Act"). Today's order, however, purports to exercise federal, not state, authority.

Generally speaking, the authority of the Commission extends to matters of intrastate, local concern while the Federal Communications Commission ("FCC"), empowered by

federal legislation, exercises authority over matters of interstate, national concern.[1] The Michigan Legislature has provided the Commission the authority to regulate the rates for interconnection, see, MCL 484.2352; MSA 1469(352), and together with other provisions of the Act, provided a statutory roadmap required to be followed by interested parties and this Commission. While it may disadvantage the economic interests of some, the constraints on this Commission's authority are not matters of discretion, but rather mandatory requirements that must be obeyed.[2]

Under state law, providers of basic local exchange services are required to provide interconnection services to competing providers under a host of requirements presumably enacted by the Michigan Legislature to insure basic fairness to all parties. See, Section 305, MCL 484.2305; MSA 1469(305). The rates for interconnection are likewise governed by state law, see, Sections 351-352. Most importantly, state law would have provided the Commission and interested parties with a contested case proceeding that not only would have

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[1]This general principle has been recently addressed and ratified by the United States Court of Appeals for the Eighth Circuit. See, Iowa Utilities Board v Federal Communications Commission, et al., Case No. 96-3321, 1996 WL 589204 (CA 8, October 15, 1996) which cited with approval the jurisdictional section of the Federal Communications Act: "[N]othing in this Chapter [i.e., the federal Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996] shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service" [quoting 47 U.S.C. §152(b) (1994].

[2] This principle is clearly expressed in Michigan statutory law and embodied in Michigan jurisprudence. See, Section 201 of the Act [limiting the Commission to the powers "prescribed in [the] Act"]; Union Carbide v PSC, 431 Mich 135,146; 428 NW2d 322 (1988) [ruling that the Commission, "[a]s a creature of the Legislature, . . . possesses only that authority bestowed upon it by statute"].

provided protection for the rights of the parties, but would also have provided the Commission with an informed record concerning the terms and conditions of interconnection upon which to base its decision in this important matter as well as legal arguments concerning state and federal jurisdiction and other issues. All of these state- mandated proceedings have been swept away by the majority and, instead, we are left with an abbreviated record and an impossible time schedule.[3] I believe that the Commission should implement its authority under state law concerning interconnection and reject the unwarranted intrusion into Michigan's sovereignty by the federal government.

The sanctity of state sovereignty and the right of a state to legislate as it sees fit are principles that have been validated by the highest court in the land:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.
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> * * *
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> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did not intend that Congress should exercise that power through the mechanism of mandated state regulation.

New York v United States, 505 US ___; 112 S Ct 2408; 120 L Ed 2d 120, 152-153 (1992).

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[3]I commend the arbitration panel for its diligent and timely efforts. This separate opinion should in no way be viewed as a criticism of their efforts.

It is unfortunate that the majority has not seen fit to protect the sovereignty of the state of Michigan.

John C. Shea, Commissioner